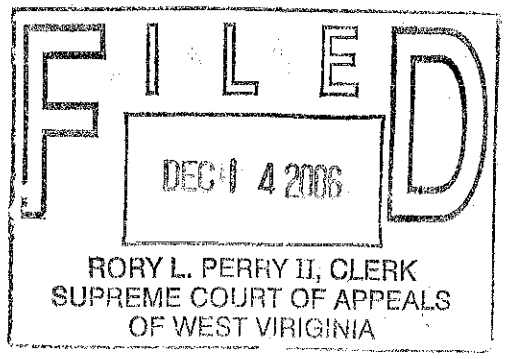
NO 33200

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

MARJORIE V. GREEN,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **Page**

STATUTES:

OTHER:

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MARJORIE GREEN,

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BRIEF OF APPELLEE

I.

KIND OF PROCEEDING AND THE NATURE OF THE RULING BELOW

Marjorie Green (hereinafter "Appellant") appeals from a judgment of conviction on two counts of Negligent Homicide. *See* W. Va. Code § 17C-5-1(a). On August 25, 2005, the Appellant was tried and convicted of driving her van in reckless disregard of the safety of others resulting in the death of Kaitlyn Dante[1] and Janeann Stehle.

II.

STATEMENT OF THE ISSUE

1. Whether the evidence, viewed in a light most favorable to the State, supports the jury's finding that the State proved that the Appellant had the requisite *mens rea* , *i.e.* that she drove her

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[1]Ms. Dante's mother, Rhonda Dante, was also severely injured. (Tr. 334-35.) The State did not prosecute the Appellant for these injuries.

van with reckless disregard for the safety of others. Syl. Pt. 1 *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995); Syl. Pt. 4 *State v. Linkous*, 194 W. Va. 287, 460 S.E.2d 288 (1995).

III.

STATEMENT OF THE CASE

On January 5, 2005, a Hampshire County Grand Jury returned a two-count indictment against the Appellant alleging that she drove her motor vehicle in reckless disregard for the safety of others, resulting in the deaths of Kaitlyn Dante (Count 1), and Janeann Stehle (Count 2).

The Appellant's jury trial began on August 25, 2005, before the Honorable Donald H. Cookman. That same day the jury returned a verdict convicting the Appellant on Counts 1 & 2. (R. 159.) At the sentencing hearing on October 7, 2005, the court sentenced the Appellant to one year on each count, said sentences to run consecutively. (R. 476.) Prior to sentencing the court denied Appellant's motion for a directed verdict. (Tr. 452-58.)

IV.

STATEMENT OF THE FACTS

On the morning of September 19, 2004, the Appellant collided with the rear of Rhonda Dante's car as Ms. Dante attempted to make a left-hand turn into a church parking lot. The collision pushed Ms. Dante's car into oncoming traffic. Ms. Dante's seventeen-year-old daughter, Kaitlyn Dante, was killed by the impact. Fifty-seven-year-old Janeann ("Jay") Stehle died when her motorcycle, approaching from the opposite direction, collided with the passenger side of Ms. Dante's car. (R. 28, 33.)

The collision occurred on Route 50, near Augusta, Hampshire County, West Virginia. Appellant does not claim that the weather or the road conditions factored into the accident. Nor does

she attribute the collision to mechanical problems. There is no evidence that she was under the influence of alcohol, drugs or prescription medication. The Appellant was 72 years old, and did not have a criminal record of any kind.

The morning of the accident Ms. Dante and her daughter, as was their practice, left for church. The Appellant was on her way to a picnic in Maryland. The entrance to the church stood across Route 50. There was a turnoff allowing eastbound drivers to turn left, across the westbound lane, into the church parking lot. As Ms. Dante waited for an opportunity to turn left, the Appellant struck the rear of the Dante car with such force as to propel it into the westbound lane where it collided with Ms. Stehle's motorcycle. (R. 18.) Ms. Stehle was part of a group of motorcyclists riding west on Route 50.[2] This group rode together as a single body.

One witness described the collision as an "explosion" sending pieces of metal and glass 30 feet in the air. (Tr. 350.) Another testified that the collision caused Ms. Dante's car windows to explode. (Tr. 354.)

The State called accident reconstructionist Trooper Geoffrey Pesko. (Tr. 361.) The trial court qualified him as an expert in accident reconstruction. (Tr. 364.) Trooper Pesko described Route 50 as a downhill slope. Eastbound 50 is a one lane road, while westbound has two lanes. (Tr. 366.) There were no pre-collision skid marks at the point of impact. (Tr. 367.) The Trooper found that the Appellant was driving her van at 59 miles an hour[3] when she struck the rear of Ms. Dante's car. (R. 84.)

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[2]State's witness James Dawson, a member of the group, estimated there were 30 riders on the road. (Tr. 338.)

[3]Four miles over the speed limit. (R. 85.)

The Appellant called accident reconstructionist Gregory Manning. Mr. Manning originally prepared his report for the Appellant's insurance company. He began by assuming that the Appellant's van was traveling at approximately 50 miles an hour when it collided with Ms. Dante's car. (R. 109.) He also found that, at 50 miles an hour, it would have taken Ms. Dante nine seconds to travel the 333 feet necessary to come to a complete stop at the church turnoff. (R. 109.)

According to his calculations the Appellant's van was 327 feet behind Ms. Dante's car when Ms. Dante first applied her brakes. (R. 109.) The Appellant failed to see Ms. Dante's brake lights for approximately nine seconds, and was 100 feet behind Ms. Dante's car before she realized it had stopped. (Tr. 109.)

As stated above, there were no pre-impact skid marks, nor did the Appellant take any measures to mitigate the seriousness of this collision. She simple drove, full speed, into the rear of Ms. Dante's car.

Mr. Manning did not find that the collision occurred because the Appellant had failed to maintain a reasonable distance between her van and Ms. Dante's car. He concluded that "[t]he primary cause of the incident is driver inattention on the part of the operator of the Dodge." (R. 110.)

The State did not introduce any evidence suggesting that the Appellant saw Ms. Dante's car before she collided with it.

V.

SUMMARY OF ARGUMENT

This most relevant question raised by the facts of this case is whether the Appellant's conduct was negligent or reckless. As stated above, the Appellant did not see Ms. Dante's car before she

collided with it. Absent this fact, this Court must decided if the Appellant's conduct constituted reckless disregard.

The State concedes that the Appellant's inattentiveness, standing alone, does not prove reckless disregard. In order for this Court to uphold the Appellant's conviction it must take one step backwards in time and determine whether a reasonable juror could have convicted the Appellant based upon her inattentiveness, combined with other factors such as the weight of her van, the road's layout, the presence of a large group of motorcyclists riding in the opposite direction, and a clearly visible turnoff.

It is the State's position that a reasonable juror, examining the totality of the circumstances, could find that the Appellant acted with the requisite *mens rea*.

VI.

ARGUMENT

A. A REASONABLE JUROR COULD HAVE FOUND SUFFICIENT PROOF OF RECKLESS DISREGARD FROM THE TOTALITY OF THE EVIDENCE INTRODUCED BY THE STATE.

Standard of Review.

This Court reviews *de novo* the sufficiency of the evidence to sustain a criminal conviction. In reviewing the sufficiency of the evidence, the Court "must view the evidence 'in the light most favorable to the government, resolving evidentiary conflicts in favor of the government, and accepting all reasonable inferences drawn from the evidence that support the jury's verdict.'" *United States v. Erdman*, 953 F.2d 387, 389 (8th Cir.), *cert denied*, 540 U.S. 1134 (2004). "[T]his standard of review is . . . a strict one, and a jury's verdict will not be lightly overturned." *United States v. Parker*, 364 F.3d 934, 943 (8th Cir. 2004). Reversal is warranted "only if *no reasonable jury* could

have found the defendant guilty beyond a reasonable doubt." *United States v. Vaquez-Garcia*, 340 F.3d 632, 636 (8th Cir. 2003), *cert denied,* 540 U.S. 1168 (2004) (emphasis added).

B. THE EVIDENCE VIEWED IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT ESTABLISHES THAT APPELLANT DROVE HER VAN WITH RECKLESS DISREGARD FOR THE SAFETY OF OTHERS.

West Virginia Code § 17C-5-1(a) states:

> When the death of any person ensues within one year as a proximate result of injury received by the driving of any vehicle anywhere in the State in reckless disregard of the safety of others, the person so operating such vehicle shall be guilty of negligent homicide.[4]

The Legislature did not define the term "reckless disregard for the safety of others"[5] in the statute. Nor did it incorporate a definition from another statute. This Court has held that "the statute requires something more than an act of ordinary negligence; the standard is the same as that applied in involuntary manslaughter prosecutions, *i.e.,* 'negligence so gross, wanton, and culpable as to show a reckless disregard for human life.'"[6] *State v. Richeson*, 179 W. Va. 533, 535, 370 S.E.2d 728, 730

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[4]*See also* W. Va. Code § 61-2-5 (involuntary manslaughter); *State v. Vollmer*, 163 W. Va. 711, 259 S.E.2d 837 (1979) (*mens rea* requirement of negligent homicide statute compatible with *mens rea* for involuntary manslaughter).

[5]It has defined it by implication in other statutory sections. *See* W. Va. Code § 21A-5-10c(B)(3) (unemployment compensation, special rules re transfer of experience and assignment of rates) (knowingly means having knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.); W. Va. Code § 55-7b-9b (liability of health care professionals rendering emergency assistance)(assistance or failure to render assistance in willful, wanton *or reckless disregard* of foreseeable risk of harm to third persons); W. Va. Code § 46A-7-111(1) (civil claims by attorney general under state consumer credit and protection act) (if creditor makes excess charge *in deliberate violation or reckless disregard* for this chapter court may order civil penalty).

[6]*See* Model Penal Code § 2.02(2)(c)(1962):

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element

(1988) (*per curiam*) (*quoting State v. Vollmer*, 163 W. Va. 711, 716, 259 S.E.2d 837, 840-841 (1979)).[7]

Involuntary manslaughter may be committed in two ways: (1) when a person does an act, lawful in itself, but in an unlawful manner and without due caution; and (2) an accidental death that occurs during the commission of an unlawful act not amounting to a felony. *See* Syl. Pt. 2, *State v. Lawson*, 128 W. Va. 136, 36 S.E.2d 26 (1989); *State v. Hose*, 187 W. Va. 429, 432, 419 S.E.2d 690, 693 (1945). The mere violation of a traffic control statute does not, in itself, prove "reckless indifference" unless the violation is a gross deviation from a reasonably prudent standard of care. *See State v. Vollmer*, 163 W. Va. at 715, 259 S.E.2d at 840. *See also Whitaker v. State*, 778 N.E.2d 423 (Ind. Ct. App. 2003).

The Appellant claims that "[t]his is the crux of the matter. Inattention while driving may certainly give rise to civil liability, but it is not an unlawful act." (Appellant's Brief at 17.) This rigid, *per se* rule does not accurately reflect the state of the law. Mere inattention does not constitute reckless behavior. Had the State only introduced evidence proving the Appellant's inattentiveness, this argument would have far more force. But the State did not rely upon her inattentiveness. It introduced other evidence suggesting that the Appellant was inattentive at a time when she needed to be attentive. An inattentive driver on a deserted county road may be less blameworthy than one

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> exists or will result from his conduct. The risk must be of such a nature and degree, that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard that a law-abiding person would observe in the actor's situation.

[7]This Court defines ordinary negligence as, "the failure of a reasonably prudent person to exercise due care in his conduct toward others from which injury might occur." *State v. Ivey*, 196 W. Va. 571, 575, 474 S.E.2d 501, 506 (1996) (quotations omitted).

traveling on a crowded city street. It is not the act the statute prohibits; criminal liability depends upon the actor's state of mind. In the case at bar the question is whether the Appellant's inattentiveness increased the risk of harm to such a degree that disregarding the risk amounts to criminal conduct. *See Commonwealth v. Wellansky*, 55 N.E.2d 902, 912 (Mass. 1944).

Based upon the evidence adduced at trial a reasonable juror could have found that the Appellant's conduct created a substantial risk of harm, that she consciously disregarded this risk, and that this disregard was a substantial deviation from acceptable standards of conduct. *See Whitaker v. State*, 778 N.E.2d at 425.

Clearly, the State proved that the Appellant's conduct created a substantial risk of harm. Two people were killed in a horrific accident caused by the Appellant's conduct. Her conduct violated a provision of the State's traffic code. *See* W. Va. Code § 17C-6-1(a) (driver must control speed as to avoid any collision).

The surrounding circumstances further bolster the State's position. The Appellant's van weighed 5,850.7 pounds, substantially heavier than most cars.[8] (Tr. 369.) She was driving four miles over the 55 mile-per-hour speed limit on a single lane road. Although the State's evidence regarding the overall volume and flow of traffic was scant, it did prove that she was behind two different cars prior to the accident.

The road's design required the Appellant's attention. Passing on either side of Ms. Dante's car was impossible,[9] the distance between the right fog line and the guard rail was approximately

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[8]Ms. Dante drove an Oldsmobile Alero four-wheel sedan which weighed 3,023.1 pounds. (Tr. 371.)

[9]The State introduced a picture of the accident scene in which a no passing sign is clearly visible.

four feet. (Tr. 316.) The Appellant's van was almost seven feet wide. (Tr. 370.) Passing on the right would require driving against the flow of oncoming traffic.

The Appellant's view of the turnoff was unobstructed. State Trooper J.E. Whisner testified that the turnoff was visible from approximately 850 feet. (Tr. 304.) Thus, a reasonable juror could infer that the Appellant saw the turnoff before she took her eyes off the road. Given the road's layout, any car turning into the church parking lot would stop the flow of traffic until the westbound lane was clear. In the case at bar, the large group of motorcyclists riding westbound required Ms. Dante to come to a complete stop before making a left-hand turn into the church parking lot.

A reasonable juror could also have found that the Appellant consciously disregarded the substantial risk created by her conduct. Although mere inadvertence or inattention do not amount to reckless disregard, the State need not prove that the Appellant knew that her conduct would lead to loss of life.

The Appellant knew she was driving a 19-foot, 6000-pound van on a one lane road, in excess of the speed limit.[10] (Tr. 315.) She knew that she ran the risk of colliding with the car in front of her if she did not maintain a proper lookout.[11] She knew that she would not be able to avoid this collision by passing on either side of the road. Certainly, she knew that Ms. Dante's car was in front of her. She knew that cars both entered and exited the flow of traffic. She knew that a driver

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[10]In fact, the Appellant subjectively believed that it would take longer to slow her van down. She had filled the van's 50 gallon water tank before she left, and believed that the extra weight would make it difficult to stop. (Tr. 311.)

The Appellant's expert testified that the weight of the van directly contributed to the seriousness of the collision, and the resulting damage. (Tr. 413.)

[11]In one of her pre-trial statements she said that a car driving in front of her kept braking and that she would be glad when she could get around her. (Tr. 310.)

intending to turn left would have to wait until the westbound lane was clear. She knew that any car trying to turn left at the church turn off would have to wait until the group of motorcyclists passed.

Notwithstanding this, the Appellant chose to take her eyes off of the road.[12] Indeed, according to the State's own expert it would have taken Ms. Dante nine seconds to travel the 333 feet needed to come to a complete stop.[13] (Tr. 402.) If the Appellant collided with Ms. Dante's car immediately after it stopped, she was over 300 feet behind her when Ms. Dante first started braking.[14] (Tr. 403.) Although Mr. Manning testified that the State overestimated the Appellant's speed at the time of impact, he did not offer his own calculations. (Tr. 411.) Instead he testified that this issue was "witness dependent," *i.e.* dependent upon what each witness observed.[15] (Tr. 406.)

State's witness Sara Watts testified that the Appellant's van was approximately three car lengths behind Ms. Dante's car just before it stopped. (Tr. 344.) She testified that the Appellant's van was driving at about the speed limit. (Tr. 345.) Biker Jason Judy testified that the Appellant's van was approximately 200 yards behind Ms. Dante's car when she stopped to turn left. (Tr. 349.) He also testified that the Appellant was driving the speed limit. (*Id.*)

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[12]State's witness Sara Watts testified that she could see the Appellant looking out the driver's side window towards the oncoming bikers just before the collision. (Tr. 344.)

[13]This also assumes that the Appellant was paying attention to Ms. Dante's car before she began braking.

[14]Ms. Dante testified that 15 to 20 seconds passed from the time she stopped to the time of impact. (Tr. 334.) State witness Sara Watts testified that she first saw Ms. Dante's car slow down. She estimated that the Appellant's van collided with the Dante car three seconds later. (Tr. 345.)

[15]The issue of speed is irrelevant as this Court will view the facts in a light most favorable to the State. The State's expert estimated the Appellant's pre-impact speed at 59 miles an hour.

The Appellant contends that her conduct constituted mere inattentiveness. There is a difference between lack of attention and lack of interest. (Tr. 379.) In the case at bar the Appellant, aware of the risks created by her conduct, chose to take her eyes off of the road. Indeed, she took her eyes off of the road for approximately nine seconds, while driving 59 miles per hour. This was not an act of simple negligence. Her conduct created a substantial risk, she was aware of the risk, and consciously disregarded it.

Appellant likens this case to *State v. Richeson, supra*. The case is distinguishable from the case at bar. In *Richeson* the defendant, driving with a broken right arm, and after taking prescription pain killers, drove across the center line and collided with a car approaching from the opposite direction. The State conceded that crossing the center line, or the unexplained failure to maintain a proper lookout did not constitute gross negligence, but argued that the defendant created a substantial risk by driving with a broken arm. This Court reversed the conviction because the State failed to prove that his physical limitations affected his ability to drive.

In the case at bar the Appellant intentionally looked out her driver's side window for nine seconds before colliding with Ms. Dante's car. Her failure to maintain a proper lookout was not unexplained or inadvertent. Therefore, the evidence could convince a reasonable juror that she made this decision knowing the risks involved.

VII.

CONCLUSION

For the foregoing reasons, this Honorable Court should affirm the judgment of the Circuit Court of Hampshire County.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

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CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellee, do hereby verify that I have served a true copy of the Brief of Appellee State of West Virginia, upon counsel for the Appellant by depositing said copy in the United States mail, with first-class postage prepaid, on this 19th day of December, 2006, addressed as follows:

To: Larry Garrett, Esq.
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ROBERT D. GOLDBERG